Cornell Law Review

Volume 93
Issue 1 *November 2007*

Article 15

Respectful Consideration after Sanchez-Llamas v. Oregon: Why the Supreme Court Owes More to the International Court of Justice

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NOTE

"RESPECTFUL CONSIDERATION" AFTER *SANCHEZ-LLAMAS V. OREGON*: WHY THE SUPREME COURT OWES MORE TO THE INTERNATIONAL COURT OF JUSTICE

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INTRODUCTION

In the decades since World War II, the growing number of treaties, international tribunals, and international organizations[1] has transformed global legal institutions.[2] For example, the European Court of Justice now has controlling authority on many matters of European law in the legal systems and national courts of European Union member states.[3] In the United States, however, the Supreme Court acts solely under constitutional authority, and the Constitution in turn dictates the scope and authority of other sources of law.[4] At the same time, the Court increasingly confronts cases that foreign or international courts have already—to some extent—addressed.[5] When this occurs, it raises a crucial question: how much deference should the U.S. Supreme Court give such decisions?

In a recent United States Supreme Court decision, *Sanchez-Llamas v. Oregon*,[6] the Court accorded "respectful consideration" to an International Court of Justice (ICJ) ruling on an issue nearly identical to the one before the Court.[7] However, the Court ultimately rejected the ICJ's ruling that Article 36 of the Vienna Convention on Consular Relations (the Vienna Convention) could override domestic procedural default rules. The Court instead held that suppression of evidence

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1 *See* SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 24 (2006) ("The increasing interaction of states and non-state actors across boundaries . . . necessitated the development of increasingly complex and sophisticated treaty regimes. . . . International organizations have continued to proliferate . . . .").

2 *See* FRANCISCO FORREST MARTIN & RICHARD J. WILSON, THE RIGHTS INTERNATIONAL COMPANION TO CRIMINAL LAW & PROCEDURE 2 (1999).

3 *See* Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1075, 1085 (2004) ("[T]he rulings of the European Court of Justice have direct effect and supremacy in the legal systems of the [European Union] member states. Thus, the member states of the EU are not juridically independent, even though this loss of independence is the result of freely chosen commitments."); *cf.* Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1981 (2004) ("Through their participation in the European Union, many European states today have surrendered prerogatives and trappings of national sovereignty long considered inviolable.").

4 *See* Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion) ("The United States is entirely a creature of the Constitution.").

5 *See* Harold Hongju Koh, The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law, *in* 12 TULSA J. COMP. & INT'L L. 1, 2–4 (2004); Jenny S. Martinez, *Enforcing the Decisions of International Tribunals in the U.S. Legal System*, 45 SANTA CLARA L. REV. 877, 878 (2005) ("International cases have been on the Supreme Court's docket in an increasingly prominent way during the past few years.").

6 126 S. Ct. 2669 (2006).

7 *See id.* at 2685.

is not an appropriate remedy for Vienna Convention violations and that regular state procedural default rules still apply in this context.[8] In light of the Court's decision in *Sanchez-Llamas*, what exactly does it mean for the Court to grant "respectful consideration" toward ICJ decisions regarding the Vienna Convention?

This question is particularly pressing for three reasons. First, although there is significant controversy regarding the Court's use of foreign judgments to interpret the U.S. Constitution,[9] there is much less dispute regarding the use of foreign and international precedent to interpret treaties.[10] More specifically, there is a dearth of academic discussion regarding the "respectful consideration" doctrine as *currently applied* to ICJ rulings.[11] Second, the narrowness of the *Sanchez-Llamas* holding suggests that another Vienna Convention case could soon come before the Supreme Court. By focusing on the remedies available for a Vienna Convention violation, the Court's holding in *Sanchez-Llamas* remained narrow and sidestepped the central issue of the judicial enforceability of Vienna Convention rights.[12] As a result, the *Sanchez-Llamas* holding may not provide adequate guidance to lower courts,[13] likely necessitating another ruling on claimants' rights under the Vienna Convention. Third, the recent appointments of

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8 *See id.* at 2674, 2677–87.

9 *See* Susan L. Karamanian, *Briefly Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745, 746–49 (2006) ("The debate *de jour* is whether U.S. courts are authorized to cite to foreign court decisions or foreign opinion to give meaning to the U.S. Constitution. . . . On the one hand are those who believe U.S. courts should not consider foreign law in interpreting the Constitution. On the other hand are those who recognize that foreign decisions may provide useful insight into certain aspects of the Constitution.").

10 *See* Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1936–37 (2005) (noting a lack of scholarly discussion about the proper role that foreign decisions should play in domestic courts' interpretation of treaties); Melissa A. Waters, *Treaty Dialogue in* Sanchez-Llamas*: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89, 89 (2007) ("[D]ebate [over domestic use of foreign precedent] has focused almost exclusively on . . . the role of foreign and international law in interpreting the U.S. Constitution.").

11 *See, e.g.*, Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the* LaGrand *Case?*, 25 HOUS. J. INT'L L. 1, 20–24 (2002) (noting the Court's "respectful consideration" doctrine briefly as part of a larger discussion on consular relations). The Supreme Court's deference to foreign courts—or lack thereof—may also have a "trickle down" effect on state and lower federal courts. *See generally* Mark Wendell DeLaquil, *Foreign Law and Opinion in State Courts*, 68 ALB. L. REV. 697 (2006) (discussing the frequent reluctance of state courts to incorporate international law into their own rulings and interpretations). Though some articles have appropriately discussed lower court application of "respectful consideration," *see, e.g.*, John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 AM. J. INT'L L. 214, 218–19 (2006), *Sanchez-Llamas* has now dated much of the existing legal scholarship.

12 This narrowness exemplifies the Court's apparent preference for "judicial minimalism" in recent years. *See The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 307–09 (2006) [hereinafter *Leading Cases*].

13 *See id.* at 311–12.

Chief Justice John Roberts and Justice Samuel Alito have renewed interest in the Court's treatment of foreign decisions, as each has fervently opposed the practice of citation to foreign authority in the constitutional context.[14] Therefore, at this crucial juncture, the Court's "respectful consideration" doctrine merits examination to understand both its application thus far and its potential effect on American jurisprudence.

This Note argues that the doctrine of "respectful consideration" has emerged as little more than a hollow acknowledgement of the ICJ before the Court engages in its own independent interpretation of the Vienna Convention. It further argues that, while the ICJ has no *actual* legal authority to interpret the Vienna Convention from the U.S. domestic perspective, the Supreme Court should nonetheless treat ICJ decisions with greater deference. Specifically, Justice Stephen Breyer's test from his *Sanchez-Llamas* dissent accords the proper level of deference by permitting, in limited circumstances, the remedies of suppression of the evidence and exceptions to state procedural default rules. By applying this test, the Court would respect the ICJ's expertise in interpreting the Vienna Convention, protect the national interest in uniform treaty interpretation, and ensure security of American diplomats abroad. Additionally, Justice Breyer's formulation of "respectful consideration" in the Vienna Convention context can and should serve as a blueprint for the Supreme Court in future treaty interpretation cases.

Part I of this Note describes the roles of treaties and foreign case law in U.S. courts and provides a brief history of the International Court of Justice. Part II chronicles the history of the Vienna Convention as well as its recent treatment in both the Supreme Court and the ICJ. Part III details the Court's interpretation of the Vienna Convention in *Sanchez-Llamas* and the dissenting opinion of Justice Stephen Breyer. Finally, Part IV evaluates the *Sanchez-Llamas* decision by considering the nature of "respectful consideration" in the Court's jurisprudence and argues that the *Sanchez-Llamas* majority ignored countervailing concerns that warrant greater deference toward ICJ decisions.

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14 During his confirmation hearings, Chief Justice Roberts argued that foreign precedent lacked accountability and was a means for a judge to "'cloak his own views'" under the guise of legitimate authority. *See* James W. Leary, Foreword, *"Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence*, 69 ALB. L. REV. vii, viii (2006). Justice Alito, at his own confirmation hearings, opined that it is neither "appropriate or useful to look to foreign law in interpreting the provisions of our Constitution." *See id.*

I
INTERNATIONAL LAW IN U.S. COURTS AND IN THE INTERNATIONAL COURT OF JUSTICE

A. Treaties in U.S. Courts

United States courts have long seemed to view treaties as both fundamental and antithetical to American jurisprudence.[15] The U.S. Constitution states that, along with the Constitution and laws made in pursuance thereof, treaties stand as the "Supreme Law of the land."[16] Furthermore, the Supreme Court has famously stated that "[i]nternational law is part of our law"[17] and integral to U.S. jurisprudence.[18] However, the United States is a "dualist" legal system which views domestic and international legal systems as distinct branches of law.[19] This is exemplified by a modern, judicially created distinction between "non-self-executing" treaties, which require national legislation in order to be given legal effect,[20] and "self-executing" treaties, which are binding and enforceable domestic law without the need for

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15 *See* Martinez, *supra* note 5, at 887 ("[T]hroughout its history, the United States has demonstrated neither a consistent pattern of obedience and respect for international law and decisions of international courts and tribunals, nor a consistent pattern of defiance and disregard.").

16 U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

17 The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

18 *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man . . . .").

19 *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 63–64 (7th rev. ed. 1997); JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 74–115 (2004); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 515 n.42 (2003) ("[T]he United States functions on a dualist system, in which international law clearly forms a part of the domestic legal system, but must be ratified and incorporated into domestic law in order to be enforceable in U.S. courts."). By contrast, in "monist" legal systems, international law is automatically part of a state's domestic legal system and may be considered superior to domestic law. *See* MALANCZUK, *supra*, at 63–64. Though this conceptual differentiation is helpful, nations often do not "neatly" divide into these two distinct categories in practice. *See id.*

20 *See* MALANCZUK, *supra* note 19, at 67.

implementing legislation.[21] Though self-executing treaties were traditionally rare, they have greatly expanded in number over the past fifty years. Currently, over four hundred treaties—both self-executing and non-self-executing—are directly enforceable in the United States.[22]

Reasoning from constitutional authority, the Supreme Court has consistently held that a federal statute enacted at a later time than a conflicting treaty will override that treaty.[23] This "later-in-time" rule prioritizes national legislation over treaty law, effectively absolving U.S. governmental actors of their treaty obligations if Congress enacts subsequent domestic legislation.[24] Despite this, whenever possible, courts should interpret a statute and a treaty to give meaning to both.[25] Even if courts do construe a federal statute to control over a treaty, the statute does not "extinguish" the United States' international obligations under that treaty.[26]

B. Citation to Foreign Precedent in U.S. Courts

The American judiciary has also been hesitant to incorporate foreign precedent into its own legal system.[27] However, in recent years the Supreme Court has increasingly looked to foreign authorities when resolving issues of constitutional interpretation,[28] most notably in such controversial constitutional cases as *Lawrence v. Texas*,[29] *Grutter*

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21 *See* MARTIN & WILSON, *supra* note 2, at 9.

22 Van Alstine, *supra* note 10, at 1892.

23 *See* Reid v. Covert, 354 U.S. 1, 17 (1957) ("'The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.'" (quoting Geofroy v. Riggs, 133 U.S. 258, 267 (1890))).

24 *See* The Cherokee Tobacco, 78 U.S. 616, 621 (1870) (recognizing a "later in time rule" under which a treaty can supersede a prior Congressional statute and a Congressional act can supersede a prior treaty); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 334–39 (2005).

25 *See* Asakura v. City of Seattle, 265 U.S. 332, 341–42 (1924).

26 *See* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 294 (2d ed. 2006).

27 *See* Alex Glashausser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 66 (2005) ("Compared with other domestic court systems, U.S. courts have given perhaps the least deference to the decisions of international tribunals . . . .").

28 *See* Koh, *supra* note 5, at 5–6.

29 *See* 539 U.S. 558, 573, 576–77 (2003) (citing the European Court of Human Rights, as well as the practices of other nations, which have held that homosexuals have the right to engage in consensual sexual conduct).

v. Bollinger,[30] *Atkins v. Virginia*,[31] and *Roper v. Simmons*.[32] For example, in *Roper* the Court considered foreign standards of decency in capital punishment and ultimately found the juvenile death penalty unconstitutional.[33]

The Court has also appeared somewhat reluctant to adopt international norms when interpreting key treaty provisions.[34] Yet, similar to the Court's treatment of constitutional interpretation, citation to foreign precedent may also be increasing in the context of treaty interpretation. Even Justice Scalia, generally a stalwart critic of applying foreign authority in the constitutional context, acknowledges the utility of foreign precedent when the Court interprets treaties.[35] Therefore, though the Supreme Court manifests a similar reluctance toward using foreign precedent when interpreting treaties as it does when interpreting the Constitution, the Court may be more amenable to such precedent in the treaty context.

C. The International Court of Justice

The International Court of Justice is the "principal judicial organ" of the United Nations[36] and is considered the most prominent international court.[37] Though all U.N. member states are automatically parties to the ICJ,[38] four distinct bases of jurisdiction exist: (1) by both parties' explicit consent,[39] (2) as stipulated by the U.N. Charter or by treaty,[40] (3) by a state's formal consent to compulsory jurisdiction,[41] and (4) by any declarations made during the existence of the

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30 *See* 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (referencing and quoting The International Convention on the Elimination of All Forms of Racial Discrimination to demonstrate a common international understanding regarding affirmative action).

31 *See* 536 U.S. 304, 316 n.21 (2002) (noting the "world community" opinion on the execution of mentally retarded persons).

32 *See* 543 U.S. 551, 575–78 (2005).

33 *See id.*

34 *See* Van Alstine, *supra* note 10, at 1929.

35 *See* Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.").

36 Karamanian, *supra* note 9, at 745.

37 *See* MARTIN & WILSON, *supra* note 2, at 21 ("The most prominent UN Charter-based court is the International Court of Justice in The Hague."); Eric A. Posner, Transnational Legal Process and The Supreme Court's 2003–2004 Term: Some Skeptical Observations, *in* 12 TULSA J. COMP. & INT'L L. 23, 32 (2004) ("The ICJ is the most prominent and prestigious of the international courts . . . .").

38 U.N. Charter art. 93, para. 1 ("All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."), *available at* http://www.un.org/aboutun/charter.

39 Statute of the International Court of Justice art. 36, para. 1, June 25, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

40 *See id.*

41 *See id.* at para. 2.

Permanent Court of International Justice.[42] Though the court's rulings are not directly binding on member states,[43] each state must "undertake[ ] to comply with the decision of the International Court of Justice in any case to which it is a party."[44] The United States originally accepted the ICJ's compulsory jurisdiction in 1946 but withdrew its acceptance in 1985 after the court rejected the United States' jurisdictional objections in *Military and Paramilitary Activities In and Against Nicaragua*.[45] The United States, however, may still consent to the ICJ's jurisdiction over certain matters, such as when it ratifies a treaty's optional protocol.[46]

II
THE VIENNA CONVENTION IN DOMESTIC AND INTERNATIONAL COURTS

A. History of the Vienna Convention on Consular Relations

The Vienna Convention on Consular Relations, a codification of then-existing customary international law on consular relations, governs the relations between a nation's citizens and its consul.[47] The preamble to the Vienna Convention states that the Convention fosters diplomacy and consular relations in an effort to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems."[48] More specifically, Article 36 mandates that receiving states must notify foreign nationals—upon arrest—of their right to contact their national consul.[49] Article

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42 *See id.* at para. 5. The Permanent Court of International Justice (PCIJ) was the predecessor to the ICJ. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 677–78 (6th ed. 2003). Article 37 of the ICJ statute also transfers all authority from the PCIJ to the ICJ. ICJ Statute, *supra* note 39, art. 37. The court may also issue advisory opinions. *See* BROWNLIE, *supra*, at 690–92.

43 *See* MURPHY, *supra* note 1, at 130.

44 U.N. Charter art. 94, para. 1, *quoted in* MURPHY, *supra* note 1, at 130.

45 *See* MURPHY, *supra* note 1, at 134–35.

46 For example, until March 2005 the United States was a party to the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 (entered into force for United States Dec. 24, 1969) [hereinafter Optional Protocol]. *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2675 (2006). This gave the ICJ jurisdiction over the United States regarding disputes over the Vienna Convention's interpretation or application. *See* Optional Protocol, art. 1, 596 U.N.T.S. at 487.

47 *See* Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 612 (1997).

48 Vienna Convention on Consular Relations pmbl., Apr. 24, 1963, 21 U.S.T. 77, 79, 596 U.N.T.S. 261, 262.

49 Article 36 of the Vienna Convention on Consular Relations states in full:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State

36 also provides that the laws and regulations of a receiving state "must enable *full effect* to be given to the purposes for which the rights accorded under [Article 36] are intended."[50] The United States, along with 169 other nations, has signed and ratified the treaty.[51] For the purposes of U.S. law, the Vienna Convention is a self-executing treaty.[52]

Due to the important subject matter of Article 36, its international legal force is unlikely to change in the foreseeable future.[53] The United States has voiced no reservations to the Convention and no state has repudiated it.[54] The United States will most likely not withdraw from the treaty, as it provides crucial protection for U.S. diplomats abroad.[55] Furthermore, because virtually all Vienna Convention cases involve the post-arrest failure to notify a foreign national of the rights that Article 36 creates, it is unlikely that the facts of a new case would disturb the current doctrines.[56] Lastly, the U.S. government has already recognized the importance of implementing and supporting the Convention's underlying policy of providing foreign

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shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Id. art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292–94.

50 *Id.* at 101 (emphasis added).

51 *See* Asa Markel, *The Vienna Convention on Consular Relations: After the Federal Courts' Abdication, Will State Courts Fill in the Breach?*, 7 CHI.-KENT J. INT'L & COMP. L. 1, 3 (2007).

52 *See* S. EXEC. REP. No. 91-9, at 5 (1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration) (stating that the Vienna Convention is self-executing and requires no domestic implementing legislation).

53 *See Leading Cases*, *supra* note 12, at 310–11.

54 *See id.*

55 *See id.*

56 *See id.*

defendants with consular notification.[57] These considerations suggest that the Vienna Convention is and will continue to be an integral part of American law and underscore the importance of the Supreme Court's treatment of this treaty.

The Vienna Convention on the Law of Treaties (Vienna Convention on Treaties), another codification of customary international law,[58] governs the standards to which states must adhere when interpreting and upholding treaty obligations.[59] Under this Convention, a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[60] The Vienna Convention on Treaties also sets forth a rule of "pacta sunt servanda," under which every state party to a treaty must act in good faith.[61] Although the United States has never ratified the Vienna Convention on Treaties, it remains incredibly influential, and international tribunals accept it as a reflection of customary international practice.[62]

B. The Vienna Convention in Modern Case Law

Despite its age,[63] the Vienna Convention on Consular Relations has been the subject of a surprisingly large number of judicial decisions within the past decade. The modern case law—both in the U.S. Supreme Court and in the ICJ—begins with *Breard v. Greene*.[64] In *Breard*, the police arrested a Paraguayan citizen, and a jury ultimately convicted him of murder.[65] The police never informed him of his Vienna Convention right to consular access, and he did not raise his claims at any point during trial, appeal, or state habeas corpus proceedings.[66] The court denied the federal habeas petition that Breard

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57 *See id.*

58 *See* Vienna Convention on the Law of Treaties pmbl., May 23, 1969, 1155 U.N.T.S. 331, 332, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (indicating the signatories' intent that the Convention serve as a codification of existing customary international law of treaties). For clarity in this Note, all references to the "Vienna Convention" refer to the Vienna Convention on Consular Relations, not the Vienna Convention on the Law of Treaties.

59 *See* Kadish, *supra* note 47, at 590–92; Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?*, 25 MICH. J. INT'L L. 929, 951 (2004) ("[T]he Vienna Convention on Law of Treaties . . . represents the codification of customary international law and is therefore binding on all States.").

60 Vienna Convention on the Law of Treaties, *supra* note 58, art. 27, 1155 U.N.T.S. at 339.

61 *Id.* art. 26, 1155 U.N.T.S. at 339; *see also* Kadish, *supra* note 47, at 591 n.164 (describing the *pacta sunt servanda* rule).

62 *See* MURPHY, *supra* note 1, at 66 & n.5.

63 The the parties signed the Convention in 1963, and the United States ratified it in 1969. *See* Kadish, *supra* note 47, at 568.

64 523 U.S. 371 (1998) (per curiam).

65 *See* DUNOFF ET AL., *supra* note 26, at 295.

66 *See id.*

eventually filed, prompting Paraguay to file an ICJ suit against the United States.[67] The ICJ unanimously stated that the United States should "take all measures at its disposal" to prevent Breard's execution before any ICJ ruling, and Breard and Paraguay subsequently brought suit in the U.S. Supreme Court.[68] However, less than an hour before Breard's execution, the Court held that "nothing in [its] existing case law" allowed it to overrule the Virginia Governor's choice not to stay the execution.[69] When considering the ICJ, the Court stated:

> [W]hile we should give *respectful consideration* to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.[70]

Virginia executed Breard that evening, and Paraguay subsequently dropped its suit.[71]

Just a year later, in *Germany v. United States*, the Court once again grappled with applying the Vienna Convention.[72] In that case, the police arrested the LaGrand brothers, two German citizens, for murder and other crimes related to bank robbery but did not inform them of their Vienna Convention rights at the time of arrest.[73] After both brothers received death sentences and sought to overturn them, reviewing courts invoked procedural default rules to foreclose any collateral attack.[74] After the state executed the first brother, Germany brought suit in the ICJ, seeking provisional measures to delay the second execution pending a final decision by the ICJ.[75] Just as in *Breard*, the ICJ granted provisional measures requesting that the United States "take all measures at its disposal" to suspend the execution.[76] Nonetheless, the U.S. Supreme Court denied that such rulings of the

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67 *See id.* The ICJ had jurisdiction over the United States because it had ratified the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. *See* Optional Protocol, *supra* note 46, art. 1, 596 U.N.T.S. at 487.

68 *See* DUNOFF ET AL., *supra* note 26, at 295.

69 *See Breard*, 523 U.S. at 378; DUNOFF ET AL., *supra* note 26, at 296.

70 *Breard*, 523 U.S. at 375 (emphasis added).

71 *See* DUNOFF ET AL., *supra* note 26, at 297–98.

72 *See* Germany v. United States, 526 U.S. 111 (1999).

73 *See* DUNOFF ET AL., *supra* note 26, at 298.

74 *See id.*

75 *See id.* In ICJ proceedings, provisional measures are a form of interim relief similar to a preliminary injunction. *See id.* at 295.

76 *See id.* at 298.

ICJ constituted a binding legal order,[77] and the state executed the second brother.[78]

Unlike in *Breard*, however, Germany persisted in its suit before the ICJ.[79] In the ICJ's *LaGrand* judgment, the court declared in sweeping language that individuals' Article 36 rights were not only an individual right but had "assumed the character of a human right."[80] As a threshold matter, the court held that its provisional measures were "binding in character and created a legal obligation for the United States."[81] It criticized the United States federal government and Supreme Court for what it saw as a perfunctory attempt at enforcing the ICJ's *Germany v. United States* decision.[82] The court found that the United States had violated its treaty obligations by failing to notify the LaGrands of their Vienna Convention rights.[83] The ICJ's reasoning rested in part upon a determination that the United States' procedural default rule effectively prohibited domestic courts from "attaching any legal significance" to its treaty obligations.[84] In essence, the court held that the rule prevented the "full effect" that the Vienna Convention requires and, therefore, violated paragraph 2 of Article 36.[85]

The ICJ's next ruling, *Case Concerning Avena and Other Mexican Nationals*,[86] provided the court with a full opportunity for exposition of its views on the Vienna Convention. In 2003, Mexico filed suit against the United States in the ICJ on behalf of fifty-four Mexican nationals on death row in the United States.[87] Mexico alleged that, in all cases, the state never informed the convicts of their Vienna Convention rights and requested ICJ provisional measures before the ICJ's final ruling.[88] Additionally, Mexico requested that the ICJ rule on the U.S. procedural default rules that had previously barred other foreign nationals' Vienna Convention claims.[89] After ordering provisional measures,[90] the ICJ held that the United States had breached its obligations and that it should "permit review and reconsideration of [the]

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77 *See* Germany v. United States, 526 U.S. at 111–12.

78 *See* DUNOFF ET AL., *supra* note 26, at 298.

79 LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27), *available at* http://www.icj-cij.org/docket/files/104/7736.pdf; *see* DUNOFF ET AL., *supra* note 26, at 299.

80 LaGrand Case, 2001 I.C.J. at 514.

81 *Id.* at 506.

82 *See id.* at 506–08.

83 *See id.* at 475–76.

84 *See id.* at 497–98.

85 *Id.* at 498.

86 *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31), *available at* http://www.icj-cij.org/docket/files/128/8188.pdf.

87 *See* DUNOFF ET AL., *supra* note 26, at 295.

88 *See id.*

89 *See id.*

90 *See Avena*, 2004 I.C.J. at 17, 70.

nationals' cases . . . with a view to ascertaining whether in each case the violation of Article 36 . . . caused actual prejudice to the defendant in the process of administration of criminal justice."[91]

In 2005, in *Medellín v. Dretke*, the Supreme Court ostensibly deferred to the ICJ's *Avena* ruling.[92] The Court, in a five to four decision, dismissed a convict's writ of certiorari as improvidently granted and acknowledged that Texas courts should enforce the *Avena* decision.[93] In a dissenting opinion, however, Justice O'Connor pointed out that Medellín *might*, but possibly might not, obtain proper relief in the Texas courts pursuant to a presidential memorandum pledging that the "United States would discharge its obligations under the *Avena* judgment 'by having State courts give effect to the decision.' "[94] Accordingly, Justice O'Connor believed that the Court of Appeals for the Fifth Circuit may have wanted to consider the possibility of granting relief in light of the President's memorandum.[95] Furthermore, Justice O'Connor even noted that "[r]easonable jurists can vigorously disagree about whether and what legal effect ICJ decisions have in our domestic courts."[96] This disagreement would ultimately serve as one of the principal points of controversy in *Sanchez-Llamas*.

III
SANCHEZ-LLAMAS V. OREGON

A. Background Facts and Procedural History

The facts of *Sanchez-Llamas v. Oregon* come from two cases that the Supreme Court consolidated. In the first case, police arrested Moises Sanchez-Llamas, a Mexican national, after an exchange of gunfire injured an officer.[97] At the time of arrest, police gave Sanchez-Llamas warnings pursuant to *Miranda v. Arizona*[98] but did not alert him of his right under Article 36 of the Vienna Convention to notify the Mexican Consulate.[99] During interrogation, Sanchez-Llamas made incriminat-

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91 *Id.* at 59–60.

92 *See* Medellín v. Dretke, 544 U.S. 660, 661–62 (2005) (per curiam). The Supreme Court has since granted certiorari in *Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006), *cert. granted*, Medellín v. Texas, 127 S.Ct. 2129 (2007) (No. 06-984).

93 *See Medellín*, 544 U.S. at 666–67.

94 *Id.* at 690 (O'Connor, J., dissenting) (quoting Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html).

95 *See id.*

96 *Id.* at 684.

97 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2675–76 (2006). Unlike Medellín, Sanchez-Llamas was not one of the fifty-four Mexican nationals involved in the *Avena* decision.

98 384 U.S. 436 (1966).

99 *See Sanchez-Llamas*, 126 S. Ct. at 2676.

ing statements to police regarding the shoot-out.[100] Before trial, he moved to suppress these statements, arguing that the police's failure to notify him of his Article 36 rights rendered his statements involuntary.[101] The trial court denied the motion and Sanchez-Llamas eventually received a sentence of over twenty years in prison.[102] Both the Oregon Court of Appeals and Supreme Court of Oregon affirmed the conviction.[103]

In the second case, authorities arrested Mario Bustillo, a Honduran national, for allegedly hitting a man in the head with a baseball bat, causing an injury that ultimately led to the victim's death.[104] Like Sanchez-Llamas, the police never informed Bustillo of his Article 36 right to contact the Honduran Consulate.[105] A jury convicted Bustillo of first-degree murder and the judge sentenced him to thirty years in prison.[106] After an unsuccessful appeal, Bustillo filed a petition for a writ of habeas corpus in state court, arguing that the authorities had violated his right to consular notification under Article 36.[107] Finding no reversible error, the Supreme Court of Virginia affirmed the state court's habeas ruling that Bustillo's claim was procedurally barred because Bustillo failed to raise the issue at trial or on appeal.[108]

B. The Majority Opinion

Chief Justice Roberts, writing on behalf of the majority in his first major international case, identified three key issues. First, the Court asked whether Article 36 of the Vienna Convention "create[d] rights that defendants may invoke against the detaining authorities in a criminal trial or in a postconviction proceeding."[109] Second, the Court considered whether a violation of Article 36 "require[d] suppression of a defendant's statement to police."[110] Finally, the Court inquired whether, in a postconviction proceeding, a state could treat a defendant's Article 36 claim as "defaulted because he failed to raise the claim at trial."[111] The Court ruled that, regardless of whether Article 36 creates judicially enforceable rights, suppression is not an ap-

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100 *Id.*
101 *See id.*
102 *See id.*
103 *See id.*
104 *See id.* Bustillo was the second petitioner in the case.
105 *Id.*
106 *Id.*
107 *Id.*
108 *See id.* at 2677.
109 *Id.* at 2674.
110 *Id.*
111 *Id.*

propriate remedy and a state can apply its regular procedural default rules.[112]

The majority never explicitly ruled on whether Article 36 creates enforceable rights.[113] Because the Court ultimately denied relief to both Sanchez-Llamas and Bustillo, it deemed it "unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights."[114] "[W]e assume, without deciding," stated the majority, "that Article 36 does grant Bustillo and Sanchez-Llamas such rights."[115]

The Court next turned to the question of suppressing a defendant's statements.[116] Sanchez-Llamas argued that the trial court should have suppressed his confession because the police never informed him of his Article 36 rights.[117] The Court first noted that the plain language of the Vienna Convention provides no remedies for Article 36 violations but instead leaves such a decision to domestic judgment: Article 36 rights "are to 'be exercised in conformity with the laws and regulations of the receiving State.'"[118] Also, given the unique nature of the American exclusionary rule, the Court deemed it "implausible" that other Vienna Convention signatories would have recognized suppression as a remedy for violations.[119] The Court then observed that it had no supervisory authority over the state courts and, therefore, could not compel suppression.[120] According to the Court, any such authority should stem from the Vienna Convention itself so as not to impermissibly "enlarg[e] the obligations of the United States under the Convention."[121]

Additionally, the Court observed that the application of the suppression remedy is extremely rare[122]—limited to exceptional constitutional cases, specifically those in which statutory violations "implicated important Fourth and Fifth Amendment interests."[123] In contrast, according to the majority, the Vienna Convention remains "at best remotely connected" to evidence gathering, and the common rationales for suppression found in the context of Fourth and Fifth Amendment

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112 *Id.*

113 *See id.* at 2677–78.

114 *Id.* at 2677.

115 *Id.* at 2677–78.

116 *See id.* at 2678–82.

117 *Id.* at 2678.

118 *Id.* (quoting Vienna Convention on Consular Relations, *supra* note 48, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292–94).

119 *See id.*

120 *See id.* at 2679 ("'It is beyond dispute that we do not hold a supervisory power over the courts of the several States.'" (quoting Dickerson v. United States, 530 U.S. 428, 438 (2000))).

121 *See id.*

122 *See id.* at 2680.

123 *See id.* at 2681.

violations are "entirely absent from the consular notification context."[124] Lastly, the Court noted that alternative means exist for protecting and enforcing Vienna Convention rights, and therefore "neither the Vienna Convention itself nor . . . precedents applying the exclusionary rule support suppression of Sanchez-Llamas' statements to police."[125]

Finally, the Court considered the issue of procedural default. Applying *Breard*-like "respectful consideration," the majority held that state procedural default rules still apply in the context of an Article 36 violation.[126] In doing so, the Court first noted that its "general rule" in habeas cases is that "a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review."[127] An exception to this procedural default rule arises when "a defendant can demonstrate both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so."[128] Quoting its opinion in *Breard*, the Court reasserted that "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."[129] Furthermore, the Court reiterated that though Article 36—and treaties in general—are federal law, so too are "provisions of the Constitution itself, to which rules of procedural default apply."[130] Therefore, the Court reasoned that *Breard*, which explicitly held that the Vienna Convention does not trump the procedural default rule, governed in the case at hand.[131]

Next, the Court addressed Bustillo's assertions that, "since *Breard*, the ICJ has interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims" and "*LaGrand* and *Avena* warrant revisiting the procedural default holding of *Breard*."[132] In rejecting Bustillo's argument, the Court noted that "[a]lthough the ICJ's interpretation deserves 'respectful considera-

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124 *Id.* ("We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable. We exclude the fruits of unreasonable searches on the theory that without a strong deterrent, the constraints of the Fourth Amendment might be too easily disregarded by law enforcement. The situation here is quite different. The failure to inform a defendant of his Article 36 rights is unlikely, with any frequency, to produce unreliable confessions. And unlike the search-and-seizure context—where the need to obtain valuable evidence may tempt authorities to transgress Fourth Amendment limitations—police win little, if any, practical advantage from violating Article 36. Suppression would be a vastly disproportionate remedy for an Article 36 violation." (citations omitted)).

125 *Id.* at 2681–82.

126 *See id.* at 2682–88.

127 *Id.* at 2682.

128 *See id.*

129 *Id.* at 2682–83 (quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam)).

130 *See id.* at 2683 (quoting *Breard*, 523 U.S. at 376).

131 *See id.* at 2683 & n.4.

132 *Id.* at 2683.

tion,'" it did "not compel [the Court] to reconsider [its] understanding of the Convention in *Breard*."[133]

The Court then used a distinctly domestic focus to analyze its judicial role in interpreting and applying treaty provisions:

> Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That "judicial Power . . . extend[s] to . . . Treaties." And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.[134]

The Court contrasted this constitutional authority with that of the ICJ:

> Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have "*no binding force* except between the parties and in respect of that particular case." Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," the Charter's procedure for noncompliance—referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies.[135]

The Court's consideration of the ICJ, therefore, stemmed from a highly U.S.-centric conception of the Court's obligations. In closing, the Court stated that "*La Grand* and *Avena* are . . . entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[136] While holding that neither suppression nor a procedural default exception would be appropriate, the Court concluded that it is "no slight to the Convention to deny petitioners' claims under the same principles [which] would apply to

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133 *Id.*

134 *Id.* at 2684 (alterations in original) (citations omitted).

135 *Id.* at 2684–85 (footnote and citations omitted).

136 *Id.* at 2685.

an Act of Congress, or to the Constitution itself."[137] In so holding, the Supreme Court refused to allow Article 36 to preclude the application of American procedural default rules.[138]

C. Justice Breyer's Dissenting Opinion

Writing for the dissent, Justice Breyer rejected the majority's dismissal of the ICJ, arguing in favor of a "sometimes," rather than "never," approach to deference to the ICJ.[139] Justice Breyer argued that: (1) a criminal defendant may raise a claim that state officials violated Article 36 of the Vienna Convention,[140] (2) state procedural default rules may *sometimes* yield to the Vienna Convention's requirement that states give it "full effect,"[141] and (3) suppression may *sometimes* be an appropriate remedy.[142]

1. *Individual Rights Under Article 36*

The dissent argued that the defendants could indeed raise an Article 36 claim.[143] Noting that the Vienna Convention is "self-executing,"[144] the dissent reasoned that the defendants must be able to make claims under the Vienna Convention because both the Constitution and the Court's own case law affirm treaties as equivalent to domestic law.[145] Under that rubric,[146] the dissent determined that the Vienna Convention itself sets forth "judicially enforceable" standards.[147] It reasoned that Article 36 intended to create individual rights because it explicitly refers to the "rights" of foreign nationals

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137 *Id.* at 2687–88.

138 Justice Ginsburg concurred in the judgment but dissented in part. *See id.* at 2688–90 (Ginsburg, J., concurring). She agreed with the dissent that Article 36 does in fact "grant[ ] rights that may be invoked by an individual in a judicial proceeding." *Id.* at 2688. Although she concurred in the judgment, she would have remanded neither Sanchez-Llamas's nor Bustillo's case for further proceedings. *See id.* She accused the dissenting faction of stretching the facts impermissibly and argued that Sanchez-Llamas himself "scarcely resemble[d]" the dissent's conception of an "uncomprehending detainee." *See id.*

139 *See id.* at 2690–709 (Breyer, J., dissenting). Justices Stevens and Souter joined Justice Breyer; Justice Ginsburg joined the dissent in part. *Id.* at 2690.

140 *See id.* at 2693–98.

141 *See id.* at 2698–705.

142 *See id.* at 2706–08.

143 *Id.* at 2698.

144 *Id.* at 2694.

145 *See id.* at 2694–95 (citing Head Money Cases, 112 U.S. 580, 598–99 (1884)).

146 *See id.* at 2695 ("[T]his court set forth [the question] in the *Head Money Cases*: Does the Convention set forth a 'law' with the legal stature of an Act of Congress? . . . [W]e are to answer that question by asking, does the Convention 'prescribe a rule by which the rights of the private citizen . . . may be determined'? Are the obligations set forth in Article 36(1)(b) 'of a nature to be enforced in a court of justice'?" (second omission in original) (quoting *Head Money Cases*, 112 U.S. at 598–99)).

147 *See id.*

and no other Article contains such language.[148] The dissent also likened the Vienna Convention to a statute and noted that courts would have "automatically assumed" that a comparable statute created "applicable law that a criminal defendant could invoke at trial."[149] Focusing on the "respectful consideration" doctrine, the dissent argued that true "respectful consideration" would accord an interpretation consistent with that of the ICJ.[150] Finally, the dissent disagreed with the executive branch's interpretation that Article 36 did not create individually enforceable rights.[151] The dissent noted that there is no presumption against individually enforceable rights and that, although executive branch interpretations deserve "great weight," they are not conclusive.[152]

2. *Procedural Default Rules and "Respectful Consideration"*

Addressing the second, "more difficult issue," the dissent examined the permissibility of a court setting aside a procedural default rule where police have violated Article 36 of the Vienna Convention.[153] The majority rigidly found that such a remedy would "never" be appropriate, but the dissent argued that Article 36 required a "less absolute answer."[154] The dissent explained that the plain language of the Vienna Convention showed that, although individual rights "shall be exercised in conformity with" the host country's laws, such laws must also "enable full effect to be given."[155] The dissent also explained that the Convention's drafting history demonstrated that the framers intentionally prioritized the "full effect" language and rejected language that would have merely required that state laws "not nullify" the Convention's rights.[156]

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148 *See id.* (noting language that suggests specific elements of the right of a foreign national who is arrested or detained).

149 *Id.* The dissent also cited numerous instances where the Court had permitted individuals to enforce treaty provisions, noting that in all such cases, the Court recognized that (1) a treaty "obligated the United States to treat foreign nationals in a certain manner," (2) the Government's conduct had breached the obligation, and (3) the foreign national could seek redress for that breach, even though the treaty did not specifically mention judicial enforcement or expressly state that it conferred rights. *Id.* at 2696.

150 *See id.* at 2696–97. Though Justice Breyer states this conclusion about "respectful consideration" when discussing enforceable rights, he does so at much greater length when discussing remedies for Vienna Convention violations. *See id.* at 2699–701.

151 *See id.* at 2697–98.

152 *See id.* (citing Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982)).

153 *See id.* at 2698–705.

154 *Id.* at 2698.

155 *Id.* (quoting Vienna Convention on Consular Relations, *supra* note 48, art. 36, 21 U.S.T. at 100–01, 596 U.N.T.S. at 292–94).

156 *See id.* at 2698–99. According to records of the meetings, proponents of this change argued that "nullify" would mean to "render completely inoperative" and that

Notably, the dissent's own "respectful consideration" of the ICJ served as its final reason for setting aside state procedural default rules.[157] Justice Breyer noted that, according to both *LaGrand* and *Avena*, state procedural default rules do not themselves violate the Vienna Convention.[158] Instead, procedural default rules only violate the Vienna Convention where government officials' failure to notify has precluded a defendant from being able to raise the issue of a Vienna Convention violation.[159]

The dissent conceded that the ICJ rulings in *LaGrand* and *Avena* were not binding but asserted that the Supreme Court nevertheless owed them "respectful consideration."[160] In support of this deference, Justice Breyer noted the importance of uniformity in treaty interpretation.[161] He noted that the ICJ is "specifically charged with the duty to interpret numerous international treaties" and, therefore, "provides a natural point of reference for national courts seeking that uniformity."[162] Justice Breyer also recognized the ICJ's "expertise in matters of treaty interpretation" and observed that the Supreme Court has "repeatedly looked to the ICJ for guidance" in interpreting treaties.[163] He concluded that the Court's interpretation stands in direct conflict with the language, history, and ICJ interpretation of the Vienna Convention[164] and is, thus, "unprecedented."[165]

Justice Breyer then directly confronted the majority's reasoning. First, he addressed the argument that respectful consideration does not require the Court to accord with a "clearly wrong" decision.[166] The dissent accused the majority of mischaracterizing the ICJ's holding and observed that the ICJ precludes action only where a government actor's violation of the Vienna Convention has prevented the

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rights under the Convention might still be "seriously impaired without becoming completely inoperative." *See id.*

157 *See id.* at 2699–705.

158 *See id.* at 2699–700.

159 *See id.*

160 *Id.* at 2700.

161 *See id.* (citing Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting)).

162 *Id.*

163 *See id.* at 2700–01. Justice Breyer cited six cases in which the Court has "looked to" the ICJ for guidance, as well as dozens of instances of similar recognition in the lower courts. *See id.* at 2701 (citing United States v. Maine, 475 U.S. 89, 99–100 (1986); United States v. Louisiana, 470 U.S. 93, 107 (1985); First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 628 & n.20 (1983); United States v. Louisiana, 394 U.S. 11, 69–72 (1969); United States v. California, 381 U.S. 139, 172 (1965); Reid v. Covert, 354 U.S. 1, 61 (1957) (plurality opinion)).

164 *See id.* at 2702.

165 *Id.*

166 *See id.*

defendant from bringing a claim sooner.[167] Second, the dissent distinguished *Breard* by noting that it had addressed a federal, not a state, procedural rule and, thus, required different treatment under the Supremacy Clause.[168] Third, the dissent argued that the "full effect" language of Article 36(2) constitutes a "clear and express statement" that the Vienna Convention may sometimes "trump" a procedural default rule.[169] Further, Justice Breyer argues that a "clear and express statement" in a treaty may not even be necessary to trump a domestic procedural rule.[170] Lastly, the dissent justified the differential treatment between Convention and constitutional rights because a treaty essentially serves as a contract between nations that warrants and requires the fulfillment of certain obligations.[171]

Justice Breyer concluded by stating that he would remand so that Bustillo could argue for modification of the procedural default requirements, while allowing the state courts to determine whether state law provided an effective remedy pursuant to the Convention.[172]

3. *Suppression of the Evidence*

Addressing the final issue, Justice Breyer asserted that suppression of evidence may *sometimes* be an appropriate remedy.[173] Though he agreed with the majority that the Convention does not create an "automatic exclusionary rule," he cautioned that "[m]uch depends on the circumstances."[174] Indeed, he noted that while *Miranda* rights do help arrested foreign nationals by informing them of their right to an attorney, such rights will not necessarily "cure" every prejudicial failure to inform them of the right to contact their consulate, so the Convention would still apply.[175]

Next, Justice Breyer rejected the majority's statement that it would be "startling" if the Vienna Convention required suppression, arguing instead that the framers of the Convention were "fully aware that the criminal justice systems of different nations differ in impor-

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167 *See id.* The dissent also noted that, in *Avena*, the ICJ permitted "review and reconsideration" by domestic courts to ensure that a defendant's failure to bring a claim resulted from the state's failure to inform the defendant of the Vienna Convention's consular access rights. *See id.* at 2703.

168 *See id.* at 2703–04. The dissent further noted that *Breard* remained consistent with the ICJ's rulings and that an exception to the dissent's general rule could be carved out for *Breard* because it was a recent decision, was decided within a few hours between the filing of a petition for certiorari and a scheduled execution, and because an exception would only apply to language not central to the holding. *See id.* at 2703–05.

169 *Id.* at 2705.

170 *See id.*

171 *See id.*

172 *See id.*

173 *See id.* at 2706.

174 *Id.*

175 *See id.*

tant ways."[176] He asserted that the general language of the Convention would require suppression whenever suppression offers the only effective remedy,[177] and he listed several common-law countries that use suppression as a remedy.[178] Justice Breyer conceded that civil law systems lack suppression as a remedy but argued that the use of greater judicial investigation in such systems tends to obviate the need for a specific suppression remedy.[179] Finally, he noted that "the *absence* of reported decisions formally suppressing confessions obtained in violation of the Convention [says] nothing at all about whether such nations give 'full effect' to the 'purposes' of Article 36(1)."[180]

IV
EVALUATING *SANCHEZ-LLAMAS V. OREGON*

As the above exposition reveals, *Sanchez-Llamas* underscores several legal tensions. For example, *Sanchez-Llamas* warrants discussion of judicial minimalism,[181] individually enforceable rights,[182] division of federal and state authority,[183] conflict between constitutional and international authority,[184] and even the implications for international law in light of the appointment of the new Justices on the Roberts Court.[185] Nonetheless, such discussions fall beyond the scope of this

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176 *Id.*

177 *See id.* at 2707.

178 *See id.* (citing cases from Australia and Canada).

179 *See id.* Civil law countries, in contrast to common law countries, focus more centrally on legislative codes that limit judges' discretion. *See* John S. Baker, Jr., *Citing Foreign and International Law to Interpret the Constitution: What's the Point?*, 69 ALB. L. REV. 683, 686 (2006). Such codification is supposed to be a "complete expression of law." *Id.*

180 *Sanchez-Llamas*, 126 S. Ct. at 2708.

181 *See Leading Cases*, *supra* note 12, at 307 ("*Sanchez-Llamas* is an example of judicial minimalism: it decided a fairly narrow set of issues, and it did so without broaching the core underlying subject, the availability of individually enforceable rights under Article 36.").

182 *See* Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under Treaties*, 44 STAN. J. INT'L L. (forthcoming 2007).

183 For a discussion of the interaction between American states and international law, see Note, *Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations?*, 116 HARV. L. REV. 2654 (2003). "[I]t should no longer be plausible for the U.S. government to assert (as it did in a brief submitted to the Supreme Court of the United States) that in attempting to compel state compliance with international obligations, '[t]he 'measures at [the United States'] disposal' under our Constitution may in some instances include only persuasion.'" *Id.* at 2655 (alterations in original).

184 *See* DUNOFF ET AL., *supra* note 26, at 293–94 (noting the inherent problems that arise when domestic and international legal obligations conflict and discussing the "later in time" rule as a domestic remedy). *See generally* Philip V. Tisne, Note, *The ICJ and Municipal Law: The Precedential Effect of the* Avena *and* LaGrand *Decisions in U.S. Courts*, 29 FORDHAM INT'L L.J. 865 (2006) (providing a partial history of the relevant case law, including domestic and international considerations for the Supreme Court).

185 With the departure of Justice O'Connor, the Roberts Court has notably shifted even further away from declaring that Article 36 bestows individually enforceable rights. The court has moved from a vote of 5-4 in *Medellín* (Justices O'Connor, Breyer, Souter, and

Note, which will instead focus on one aspect of the decision: the deference that the U.S. Supreme Court should pay toward the ICJ's interpretation of those international treaties within the ICJ's jurisdiction. Indeed, the case brings a renewed interest in the interactions between the Court and the ICJ and necessitates an examination of the ongoing emergence of the doctrine of "respectful consideration."

A. The Function of "Respectful Consideration" in *Breard* and *Sanchez-Llamas*

From its inception in *Breard*, the "respectful consideration" doctrine appeared to preclude significant deference toward the ICJ. Indeed, the *Breard* Court's first mention of the concept was also its last: its initial statement that "we should give respectful consideration to the interpretation of [a] treaty rendered by an international court" was immediately followed by the assertion that "procedural rules of the forum State govern the implementation of the treaty in that State."[186] The Court supported the latter statement not only with its own precedent but also with Article 36(2)[187] and continued to review the Vienna Convention and related doctrine through its own system of reasoning.[188] The Court's final mention of the ICJ dismisses it.[189] Even the dissenting Justices fail to note the majority's dismissal of the ICJ and instead argue against the majority on other grounds.[190]

Scholars writing about *Breard* before *Sanchez-Llamas* have observed the dismissive nature of "respectful consideration." For example, one commentator suggested that "respectful consideration" amounted to little more than "inconsequential politeness" in *Breard* and that American courts may never apply true "respectful consideration."[191] Another noted that, in *Breard*, the Court only "grudgingly

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Stevens dissenting) to the current 6-3 vote in *Sanchez-Llamas* (Justices Breyer, Souter, and Stevens dissenting). *Compare* Medellín v. Dretke, 544 U.S. 660 (2005), *with Sanchez-Llamas*, 126 S. Ct. 2669.

186 Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

187 *See id.* ("This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'" (citations omitted)).

188 *See id.* at 375–78.

189 *See id.* at 378 ("It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. . . . If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.").

190 *See id.* at 379–81 (Stevens, J., dissenting).

191 Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 804 (2004) ("[T]he claim that courts 'should give respectful consideration to the interpretation of an international treaty rendered by an international

acknowledged" the ICJ via respectful consideration.[192] Still another scholar remarked that such disrespect could lead to the demise of the use of "good faith" in treaty interpretation.[193] However, such scholarly articles have not devoted significant space to the "respectful consideration" doctrine, possibly because the *Breard* Court only used the term once before moving on to its own reasoning. In *Sanchez-Llamas*, by contrast, the majority and dissent actively applied "respectful consideration," thus opening up the door to greater academic analysis.

Taken together, *Breard* and *Sanchez-Llamas* constitute the likely foundation of the Court's future jurisprudence regarding foreign precedent and treaty interpretation. At least one scholar has already argued that Chief Justice Roberts engaged in a surprising amount of "dialogue" with the ICJ and Vienna Convention treaty partners.[194] Notably, Chief Justice Roberts looked beyond the plain meaning of the treaty and considered the views of other parties to the treaty and the analysis of the ICJ.[195] As such, Chief Justice Roberts and Justice Breyer both wielded foreign precedent, but they disagreed over its meaning and application to the issue before the Court.[196] This tension indicates that the Court could still pursue either a transnationalist or nationalist formulation of "respectful consideration." By moving in a transnationalist direction, the Court could give true "respectful consideration" by considering foreign authority in treaty interpretation, as even Justice Scalia seems willing to do. Alternatively, by moving in a nationalist direction, the Court could continue to invoke "respectful consideration" to pay mere lip service to the ICJ while deciding cases as if there were no ICJ ruling at all.

B. Why the Supreme Court Owes More to the International Court of Justice

Sanchez-Llamas is likely to provoke significant commentary, particularly from scholars who had already voiced concerns about the Court's nationalist formulation of "respectful consideration" toward the ICJ.[197] Others, however, have already articulated a common argu-

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court with jurisdiction to interpret [it]' amounted, in practice, to an exercise in inconsequential politeness." (second alteration in original) (footnote omitted)).

192 *See* Glashausser, *supra* note 27, at 68.

193 *See* Van Alstine, *supra* note 10, at 1938 ("[B]ecause the I.C.J. is the international court of final appeal for issues within its consensual jurisdiction, the grounds for deference to authoritative I.C.J. interpretations are particularly compelling. Failure to defer to such interpretations means that domestic courts become active participants in direct violations of the treaty obligations of the United States under international law.").

194 *See* Waters, *supra* note 10, at 89.

195 *See id.* at 93–96.

196 *See id.* at 94.

197 At least one scholar, however, has suggested that *Sanchez-Llamas* is not nearly as detrimental to international law as it may first appear to be. *See* Janet Koven Levit,

ment against deference to the ICJ: the ICJ does not have authority to resolve questions of municipal law in place of municipal courts. According to this argument, the ICJ only has authority to "interpret municipal law as a factual matter for the purposes of international legal proceedings."[198] As such, the ICJ's interpretation of the Vienna Convention is essentially "irrelevant to the task of interpreting those provisions as they exist in U.S. law."[199]

Although it is clearly correct that the ICJ has no *actual* binding legal authority over U.S. courts, the treaty-based nature of *Sanchez-Llamas* extends beyond a mere "question of authority." Indeed, as Justice Breyer argued, the ICJ is a "natural point of reference" for courts facing questions of treaty interpretation because it specializes in interpreting certain treaties.[200] Therefore, the ICJ's decisions warrant more than a mere modicum of recognition—much more than the Court's dismissive formulation of "respectful consideration"—in order to prevent countless potentially negative effects both domestically and abroad.

In the Vienna Convention context, therefore, the proper legal test should be that which Justice Breyer proffers in his dissent. As a preliminary matter, individual defendants should be able to raise Vienna Convention violation claims because the Convention is incorporated into the Supremacy Clause and has judicially enforceable standards. Then, state courts should *sometimes* be able to set aside procedural default rules if a Vienna Convention violation caused the defendant's failure to raise the claim in a timely manner and there is no other way for the court to provide effective relief for the violation. Additionally, state courts could also suppress evidence in the few cases where it is the only available remedy to cure prejudice.

This test constitutes true "respectful consideration" by both showing deference to the ICJ's interpretation of the Vienna Convention's "full effect" clause and conforming to U.S. domestic law. Three reasons, outlined below, militate in favor of the dissent's test.

Sanchez-Llamas v. Oregon: *The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29 (2007) (arguing that, despite the seemingly harmful nature of the judgment to the international legal process, the Court left ample room for state and federal courts to adjudicate Vienna Convention claims).

198 Tisne, *supra* note 184, at 906–07; *see also* Julian G. Ku, Sanchez-Llamas v. Oregon: *Stepping Back from the New World Court Order*, 11 LEWIS & CLARK L. REV. 17, 19 (2007) (arguing that the ICJ's judgments are not—and should never be—binding on courts unless treaty-makers or Congress have demonstrated a "clear statement" of such an intent).

199 Tisne, *supra* note 184, at 907.

200 *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2700 (2006) (Breyer, J., dissenting).

1. *Uniformity of Interpretation*

First, the *Sanchez-Llamas* majority's formulation of "respectful consideration" threatens to undermine consistent interpretation of the Vienna Convention. Indeed, a treaty "begins its life with a single, uniform content shaped by the mutual design of the treaty parties."[201] Yet only adjudication by and deference to a single interpreting court, such as the ICJ, can settle and preserve that uniform content. Because the ICJ is the international "court of final appeal" for issues within its jurisdiction, its pronouncements on treaties are compellingly authoritative.[202] Thus, in the present case of the Vienna Convention, breaking from the ICJ's interpretation constitutes a drastic departure from any hope of "uniform content."

Though some scholars recognize inherent variability in all treaty interpretation, they also note a risk of total American judicial isolation.[203] One commentator, for example, observes the inescapable complications arising from treaty interpretation but also states that "[p]rudence—not deference—suggests that before allowing an execution, waiting for the complete opinion of a juristic body with particular competence in an area would be warranted."[204] Indeed, without an attempt to align world judicial opinions on treaty interpretation, a lack of uniformity under the Vienna Convention seems inevitable given the U.S. Supreme Court's ruling in *Sanchez-Llamas.*

The Vienna Convention underscores the problems that inconsistent interpretation would create. The Convention has an ICJ dispute settlement clause that the United States and other countries agreed to when they ratified the treaty.[205] By undermining the ICJ and the consistency of its treaty interpretation, Americans abroad will lose certain rights that the U.S. Constitution guarantees, such as the right to counsel and *Miranda* warnings. If two standards emerge, with the United States advocating a lower standard, it will create a "race to the bottom" and hurt Americans who are denied such rights.

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201 Van Alstine, *supra* note 10, at 1937.

202 *See id.* at 1938.

203 *See* Glashausser, *supra* note 27, at 85–86 ("In interpreting international agreements, one should keep in mind that there is no such thing as *a* treaty. A single document, or a single provision, can have multiple meanings. . . . In sum, difference among interpreters of treaties may be inevitable. Deference is inappropriate. But independence need not spawn indifference.").

204 *Id.* at 86.

205 *See* Optional Protocol, *supra* note 46, art. 1, 596 U.N.T.S. at 487 (giving compulsory jurisdiction to the ICJ over disputes arising out of the Vienna Convention's interpretation or application). The United States withdrew from the protocol on March 7, 2005. *See* Tisne, *supra* note 184, at 865 n.3.

2. *The Structure of the International Court of Justice*

Second, the Court should extend more deference because the ICJ's structure places it in an ideal position to ensure a fair and global administration of the Vienna Convention. Because the ICJ hears fewer cases than the U.S. Supreme Court, it can spend several years considering cases, which allows it to deliberate more thoroughly on competing arguments.[206] Furthermore, the fifteen judges are "persons of high moral character, who possess the qualifications required in their respective countries,"[207] and many were themselves former diplomats.[208] As such, they have greater awareness of the subtleties of international treaties than a U.S. Supreme Court Justice. Additionally, the judges write their opinions in both English and French[209] and are thus far more inclined to investigate world legal opinion than is the U.S. Supreme Court with its inevitably Anglocentric perspective.[210]

In *Sanchez-Llamas*, the majority did not spend a significant amount of time weighing the merits of the ICJ as a judicial system. Though the opinion mentioned the structure of the ICJ, it did so dismissively.[211] Furthermore, unlike the dissent, the majority did not consider the added expertise of the ICJ in the area of treaty interpretation.[212] This is striking because the Supreme Court often recognizes appropriate expertise in domestic contexts, such as its traditional deference to the Federal Circuit in matters of patent litigation.[213] Admittedly, the Supreme Court is charged with directly reviewing the Federal Circuit's decisions and has a longstanding tradition of relying

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206 *See* Glashausser, *supra* note 27, at 80.

207 ICJ Statute, *supra* note 39, art. 2.

208 *See* Ernst-Ulrich Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 J. INT'L ECON. L. 529, 536 (2007).

209 *See* ICJ Statute, *supra* note 39, art. 39.

210 *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2680–81 (2006).

211 *See id.* at 2684–85 ("Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case.' Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. While each member of the United Nations has agreed to comply with decisions of the ICJ 'in any case to which it is a party,' the [United Nations] Charter's procedure for noncompliance—referral to the Security Council by the aggrieved state—contemplates quintessentially *international* remedies." (citations omitted)).

212 *See id.* at 2700–01 (Breyer, J., dissenting).

213 *See, e.g.*, United States v. Fausto, 484 U.S. 439, 464 n.11 (1988) ("Because of the unique character of the Federal Circuit, its conclusions are entitled to special deference by this Court. . . . Because its jurisdiction is confined to a defined range of subjects, the Federal Circuit brings to the cases before it an unusual expertise that should not lightly be disregarded.").

on the Federal Circuit's expertise. The current "respectful consideration" given to the ICJ, in contrast, ignores any argument that courts should rely on ICJ rulings due to the ICJ's specialization and expertise.

3. *The Diplomatic Interests of the United States*

Third, by applying a de facto "disrespectful consideration" doctrine, the United States endangers its interests abroad. The Inter-American Commission on Human Rights, the European Parliament, and the U.N. High Commissioner for Human Rights have all vigorously criticized the United States for its perfunctory application of the Vienna Convention.[214] These criticisms suggest that the Supreme Court's application of the doctrine has harmed the United States' reputation as a human rights leader.[215] By reinforcing the dismissive formulation of "respectful consideration," *Sanchez-Llamas* may further reinforce this negative perception.

Just as importantly, the United States risks the loss of reciprocal protection of its own nationals by failing to accord true "respectful consideration" to treaties. The Vienna Convention states in its preamble that one of its purposes is to "contribute to the development of friendly relations among nations."[216] Indeed, these relations have tangible effects on many Americans abroad.[217] By essentially disregarding the ICJ's declared international standards with a hollow "respectful consideration" doctrine that engenders worldwide criticism, the Supreme Court threatens to undermine these critical relations.[218] For example, in the wake of a U.S. execution of a Mexican national who had been denied consular access, Mexican President Vi-

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214 *See* Brief of Former U.S. Diplomats as Amici Curiae in Support of Petitioners Mario A. Bustillo and Moises Sanchez-Llamas at 12–13, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) (Dec. 22, 2005) (Nos. 05-51 and 04-10566).

215 *See id.* at 13; *see also* Harold Hongju Koh, *Restoring America's Human Rights Reputation*, 40 CORNELL INT'L. L.J. 635 (2007) (discussing the ways in which the current war on terror has undermined the United States' human rights policies).

216 Vienna Convention on Consular Relations, *supra* note 48, pmbl., 21 U.S.T. at 79, 596 U.N.T.S. at 262.

217 *See* Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (concurring opinion) ("The protections afforded by the Vienna Convention go far beyond [this] case. United States citizens are scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.").

218 Under the doctrine of "retorsion," a nation may choose to disregard its treaty obligations if it believes that one of its treaty partners is also failing to uphold its obligation. *See* Markel, *supra* note 51, at 26–27. In the Vienna Convention context, this could have consequences for Americans seeking consular assistance. *See* Asa W. Markel, *International Law and Consular Immunity*, ARIZ. ATT'Y, Jan. 2007, at 22, 22 ("[I]f foreign nationals in the United States are not accorded their full rights under consular law, then foreign countries are legally justified in suspending those rights for Americans traveling abroad.").

cente Fox cancelled a visit to President Bush's Texas ranch as an "unequivocal signal" of protesting the execution.[219] Such dramatic tensions could in turn undermine the United States' attempt at securing rights of its own citizens abroad. The U.S. State Department, for example, forcefully protested the trial of U.S. citizen Lori Berenson in Peru, arguing that she was denied due process because she was tried in a closed military proceeding.[220] Though she was ultimately granted a public civilian hearing, foreign countries may resist future U.S. protest if the United States does not provide appropriate remedies for violations of its consular obligations.

In contrast, most foreign courts have escaped this criticism by complying with the ICJ's Vienna Convention interpretation and its orders to remedy convention violations. The dissent in *Sanchez-Llamas* noted this trend, focusing particularly on common-law courts considering the suppression remedy.[221] For example, in *Tan Seng Kiah v. The Queen*, an Australian criminal court held that suppression was appropriate when police failed to notify a foreign national of a statutory right to contact a consulate.[222]

One way to minimize discord in the application of the Vienna Convention among diverse legal systems is to expressly allow for and embrace minor variations among countries' administration of treaties.[223] The European Court of Human Rights, for example, has developed a "margin of appreciation" doctrine that allows for "reasonable deviation" in domestic implementation of human rights obligations.[224] In the Vienna Convention context, the Supreme Court could ensure reciprocity by similarly creating a "margin of appreciation" framework for state courts. Such a balance would not only signal the United States' commitment to its treaty obligations but also balance the United States' own laws with its international obligations.

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219 *See* Brian Knowlton, *Fox echoes world on the death penalty: Execution pits Mexico against U.S.*, INT'L HERALD TRIB., Aug. 16, 2002, at 1, *available at* http://www.iht.com/articles/2002/08/16/death_ed3_.php?page=1.

220 *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1451–52 (2002).

221 *See* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2707 (2006) (Breyer, J., dissenting) ("[T]here are several cases from common-law jurisdictions suggesting that suppression is an appropriate remedy for a Convention violation.").

222 *See* Tan Seng Kiah v. The Queen, (2001) 160 F.L.R. 26 (Austl. Crim. App. N. Terr.).

223 *See* Glashausser, *supra* note 27, at 33–34.

224 *See id.* The "margin of appreciation" doctrine "expressly contemplates that international treaty obligations originating from a unitary text may be interpreted in different ways in different states." Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 404 (1998).

C. "Respectful Consideration" After *Sanchez-Llamas v. Oregon*

Now that the Supreme Court has twice employed "respectful consideration" when discussing ICJ decisions, it leaves open the question of how the Court should apply the doctrine in the future, especially in contexts other than that of the Vienna Convention. Indeed, any future cases that involve the ICJ will almost certainly accord "respectful consideration" per *Breard* and *Sanchez-Llamas*. However, because the Court has not explicitly fleshed out the steps required for "respectful consideration," it leaves open the possibility of greater future deference toward the ICJ.

Justice Breyer's dissent, as the superior test for Vienna Convention violations, provides a possible blueprint for Supreme Court "respectful consideration." First, the Court can look to the plain text and drafting history of the treaty itself in order to formulate a tentative interpretation of its meaning. Second, the Court can compare this reading to that of the ICJ, noting specifically the ICJ's interpretation of the treaty as it applies in the United States and other countries. Third, the Court can consider other factors, such as the history of the United States' ratification of the treaty or the ICJ's particular expertise in certain matters, to either give greater or less weight to the ICJ's interpretation. This review process will usually include a consideration of both U.S. Supreme Court and lower court case law to better understand American courts' past treatment of the ICJ. Finally, the Court will compare its interpretation with that of the ICJ and, absent a "clearly wrong" ICJ interpretation, make a good faith attempt to comply with the ICJ's interpretation within the particular domestic procedural or substantive framework.

There are many advantages to this robust form of "respectful consideration." First, it ensures that the Court simultaneously engages in its own textual analysis of a treaty and recognizes the treaty as an integral part of U.S. law. Second, it avoids the *Sanchez-Llamas* majority's cursory treatment of the ICJ's authority by always considering the factors that could militate in favor of the ICJ's previous treaty interpretations. In doing so, it will ensure that the Court does not overlook certain issues of national importance, such as foreign treatment of U.S. citizens abroad.

Most importantly, this true "respectful consideration" test would ensure a future transnationalist trajectory for the Court. As noted previously, the Court will increasingly face foreign and international decisions as it decides various matters of law. This framework would provide a useful procedure for navigating the complex intersection of domestic and foreign law.

CONCLUSION

As legal systems continue to integrate in a globalizing world, U.S. courts will increasingly face divergent domestic and international obligations. Though the International Court of Justice does not assert any formal authority over the U.S. Supreme Court, its mounting influence over a variety of international legal matters should cause the Court to heavily weigh the ICJ's decisions. Yet today, the Court's emerging doctrine of "respectful consideration" appears to be a judicial tool for creating an ever-wider schism between the Court and the legal standards of the international community.

Indeed, the Court's current formulation of "respectful consideration" constitutes little more than a hollow front from the perspective of the international legal community. The *Sanchez-Llamas* dissent correctly asserts that applying true "respectful consideration" to the ICJ's interpretation would both foster uniformity—"an important goal of treaty interpretation"—and acknowledge the ICJ's "expertise in matters of treaty interpretation."[225] In contrast, the majority opinion undermines these goals, risking reciprocal treatment of Americans abroad and hinting at future Roberts Court defiance toward international precedent in the treaty interpretation context.

At this time, however, the "respectful consideration" doctrine still has great potential to move in a transnationalist direction. By even considering the ICJ and its interpretation of the Vienna Convention, the Court has already engaged in transnational dialogue. By fleshing out "respectful consideration" with true deference in the future, the Supreme Court can ensure a jurisprudence that is not only consistent with domestic law but also fully complies with the United States' international legal obligations.

225 *Sanchez-Llamas*, 126 S. Ct. at 2700–01.